

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FREDERICK ALLAN MATTHEWS,

Defendant-Appellant.

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UNPUBLISHED

January 14, 2014

No. 313021

Allegan Circuit Court

LC No. 11-017298-FH

Before: HOEKSTRA, P.J., and MARKEY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions for first-degree home invasion, MCL 750.110a(2), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We affirm.

The record supports that defendant and his accomplice were involved in a home invasion in the late morning of June 29, 2011. The homeowner returned home during the home invasion and noticed an unfamiliar Chevy Impala parked in his driveway with the engine running but nobody inside the vehicle. As the homeowner was investigating the Impala, he saw defendant's accomplice walk out of the garage that was attached to the house. The homeowner confronted the accomplice and told him to wait for the police to arrive. About five minutes after confronting the accomplice, the homeowner saw defendant run through his backyard away from his house. Defendant ran into the cornfield that was located beyond the homeowner's backyard. Employees at an industrial gravel pit bordering the cornfield saw defendant emerge from the cornfield soon after he fled the house. The police apprehended defendant at the gravel pit and brought him to the homeowner's house, where he identified defendant with 85 percent certainty as the man who fled through his backyard. Meanwhile, the police apprehended defendant's accomplice who had fled in the Impala. The police recovered items from the Impala that belonged to the homeowner and also found a pair of gloves outside the house next to a crowbar or chisel.

At trial, the homeowner testified that he was "positive" that defendant was the man who fled through his backyard on the day in question. A DNA expert testified that she tested the gloves found at the house and determined that the DNA recovered from the gloves matched defendant's DNA. The homeowner and his wife each testified that they did not give anyone permission to enter their house on the day in question. They further testified that when they searched their house after the home invasion, they observed that the sliding door that opened to

the backyard had been unlocked and left open. The homeowners also testified that several items were missing and other items were relocated within the house. A camera, iPod, and laptop computer had been gathered into a beach bag and moved into the closet of their guest bedroom. The bag was found on top of a handgun that had been in the master bedroom.

Defendant first argues that the prosecution presented insufficient evidence to support his convictions. We disagree. This Court reviews de novo a claim of insufficient evidence. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). We “‘must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt.’” *Id.* (citation omitted). Moreover, we “must make all reasonable inferences and resolve all credibility conflicts in favor of the” trier of fact. *People v Solmonson*, 261 Mich App 657, 661; 683 NW2d 761 (2004). “It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences.” *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

Here, the trial court instructed the jury regarding criminal culpability of the charged offenses either as a principal or an aider and abetter. The jury convicted defendant of first-degree home invasion and felony-firearm, but the verdict did not indicate whether the jury found defendant guilty as a principal or under an aiding and abetting theory. As applied to the facts of this case, a person is guilty of first-degree home invasion where he (1) breaks and enters a dwelling or enters a dwelling without permission, (2) intends when entering to commit larceny<sup>1</sup> or actually commits larceny while present in the dwelling, and (3) is armed with a dangerous weapon.<sup>2</sup> MCL 750.110a(2); *People v Wilder*, 485 Mich 35, 43; 780 NW2d 265 (2010). A person is guilty of felony-firearm when he or she possesses a firearm when committing, or attempting to commit, a felony. MCL 750.227b; *People v Johnson*, 293 Mich App 79, 82-83; 808 NW2d 815 (2011). Under an aiding and abetting theory, “a defendant is liable for the crime the defendant intends to aid or abet as well as the natural and probable consequences of that crime.” *People v Robinson*, 475 Mich 1, 14-15; 715 NW2d 44 (2006).

The general rule is that, to convict a defendant of aiding and abetting a crime, a prosecutor must establish that “(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and

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<sup>1</sup> The elements of larceny are (1) the actual or constructive taking of another’s property without consent; (2) movement of that property; and (3) the specific intent to steal or permanently deprive the owner of the property. *People v Cain*, 238 Mich App 95, 120-121; 605 NW2d 28 (1999).

<sup>2</sup> MCL 750.110a(1)(b)(i) defines “dangerous weapon” as including a “loaded or unloaded firearm, whether operable or inoperable.”

encouragement.” [*People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004), quoting *People v Carines*, 460 Mich 750, 768; 597 NW2d 130 (1999).]

Here, the evidence, when viewed in a light most favorable to the prosecution, supports the reasonable inference that defendant helped procure the vehicle used for the home invasion and that he and his accomplice drove to the house and entered it without permission with the intent to steal items of value. The prosecution presented evidence that defendant’s girlfriend rented the Impala two days before the crime; the Impala was left in the driveway with its engine running during the home invasion; gloves containing defendant’s DNA were found outside the house next to break-in tools; items of value were relocated within the house or taken from the house, and both defendant and his accomplice fled the scene after the homeowner arrived home unexpectedly. The evidence also established that the back sliding door was left ajar after the home invasion; and the homeowner who interrupted the home invasion testified that defendant ran through the backyard away from the house soon after his accomplice exited the garage door on the side of the house. This evidence, viewed in a light most favorable to the prosecution and making all reasonable inferences in favor of the jury verdict, supports that defendant entered the house without permission and with the intent to commit larceny therein or intentionally and knowingly assisted another to commit those acts.

Moreover, the evidence supported the reasonable inference that during the commission of the home invasion and larceny, either defendant or his accomplice discovered a firearm belonging to the homeowner, possessed this firearm, and subsequently discarded the firearm along with other valuable items. Although the prosecution was unable to present evidence linking defendant, rather than his accomplice, to the possession of the firearm, the possession of the firearm was a natural and probable consequence of the intended home invasion. Because “a defendant is liable for the crime the defendant intends to aid or abet as well as the natural and probable consequences of that crime,” *Robinson*, 475 Mich at 14-15, this evidence was sufficient to enable the jury to find beyond a reasonable doubt that defendant either possessed a firearm or aided and abetted his accomplice’s possession during the home invasion. Thus, viewed in a light most favorable to the prosecution and making all reasonable inferences in favor of the jury verdict, the evidence was sufficient to sustain defendant’s convictions of first-degree home invasion and felony-firearm, i.e., the jury could have found that the essential elements of the crimes were proven beyond a reasonable doubt. *Herndon*, 246 Mich App at 415.

Defendant also argues that the prosecution presented insufficient evidence at the preliminary examination to support the district court’s finding that the necessary probable cause existed to bind defendant over for trial. But “the presentation of sufficient evidence to convict at trial renders any erroneous bindover decision harmless.” *People v Bennett*, 290 Mich App 465, 481; 802 NW2d 627 (2010). Therefore, because the prosecution presented sufficient evidence to sustain defendant’s convictions, we decline to address this claim.

Defendant next argues that the prosecutor’s opening statement constituted misconduct where the prosecutor referenced facts that were not subsequently presented to the jury. We disagree. “The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial.” *People v Mesik*, 285 Mich App 535, 541; 775 NW2d 857 (2009). Allegations of prosecutorial misconduct are reviewed on a case-by-case basis, considering the prosecutor’s remarks in context. *Bennett*, 290 Mich App at 475. Unpreserved claims of misconduct are

reviewed for plain error that affected substantial rights. *Id.* When a prosecutor states that evidence will be presented to the jury, which is not later presented, reversal is not required unless the prosecutor has acted in bad faith, i.e., with the intent to deceive, or his actions prejudiced the defendant. *People v Wolverton*, 227 Mich App 72, 75-77; 574 NW2d 703 (1997).

During the contested portion of the prosecutor's opening statement, the prosecutor told the jury that defendant and his accomplice "were doing this home invasion together" and that they collected items from the house, including a firearm, camera, iPod, and laptop computer, with the intent to steal those items. On appeal, defendant contends that the prosecution failed to present any evidence supporting the foregoing factual assertions and that no evidence proved that he "aided and abetted in any way." As we discussed in detail above, the prosecution presented ample evidence supporting the reasonable inference that defendant and his accomplice were working in concert during the home invasion and that they intended to steal items from the house, including a firearm, laptop computer, and iPod. Thus, defendant has not established that the prosecutor's opening statement constituted plain error. The prosecution merely stated its theory of the case and the evidence it intended to present in support of that theory; the record does not demonstrate bad faith or that defendant was denied a fair and impartial. *Id.*

Defendant next argues that he was denied his right to counsel of his choice. Defendant asserts for the first time on appeal that the Allegan County Jail in which he was incarcerated awaiting trial had a policy that prohibited its inmates from visiting with attorneys that were not the inmate's attorney of record and that this policy denied him his right to counsel of his choice when jail personnel prevented him from meeting with attorneys for the purpose of potentially hiring one of them. The erroneous deprivation of a defendant's right to retain counsel of his choice is a structural error requiring reversal without a showing of prejudice. *United States v Gonzalez-Lopez*, 548 US 140, 148-150; 126 S Ct 2557; 165 L Ed 2d 409 (2006).

Defendant, however, did not meet his burden as the appellant "of furnishing the reviewing court with a record to verify the factual basis of any argument upon which reversal was predicated." *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000). The record before us contains no evidence of the alleged Allegan County Jail policy. Moreover, the record supports that defendant retained trial counsel, who represented him at the July 19, 2011 preliminary examination, at each of the subsequent six motion hearings, at trial, and at the sentencing hearing. Nothing in the lower court record indicates that defendant ever objected to his trial counsel's representation or sought to replace counsel with a different attorney. Defendant never asserted before the trial court that he was denied the right to counsel of his choice. In sum, nothing in the record before us supports that defendant attempted to meet with other counsel or that the Allegan County Jail had a policy would have prevented defendant from retaining other counsel. Thus, defendant has not met his burden of providing a factual basis for his claim that he was denied his right to counsel of his choice.

Next, defendant argues that he was denied the equal protection of the law<sup>3</sup> because Allegan County had a local policy of prohibiting *Cobbs* plea bargains.<sup>4</sup> Again, defendant has not met his burden of furnishing a record to verify the factual basis of his argument, and we need not address defendant's claim. *Elston*, 462 Mich at 762. The record before this Court provides no indication that defendant ever sought a *Cobbs* plea, or that any such request would have been futile because of an Allegan County policy. The lower court record simply indicates that defendant was offered, and rejected, a plea agreement before his trial commenced. On appeal, defendant merely attaches a self-serving affidavit, alluding to Allegan County's alleged policy. Defendant's affidavit constitutes an impermissible expansion of the record on appeal, and we will not consider it. *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999). Defendant's the affidavit, even if considered, falls far short of establishing the necessary factual basis to support such a claim on appeal. *Elston*, 462 Mich at 762. Moreover, a defendant does not have a constitutional right to a plea bargain of any type. *Weatherford v Bursey*, 429 US 545, 561; 97 S Ct 837; 51 L Ed 2d 30 (1977).

Finally, defendant argues that the cumulative effect of the errors below denied him his right to a fair trial. We disagree. The cumulative effect of several errors can constitute sufficient prejudice to warrant reversal even when any one of the errors would not alone warrant reversal. *People v Dobek*, 274 Mich App 58, 106; 732 NW2d 546 (2007). But only actual errors may combine to cause sufficient prejudice to merit reversal. *People v LeBlanc*, 465 Mich 575, 591-592, n 12; 640 NW2d 246 (2002). Here, defendant has not demonstrated any actual error. Therefore, defendant has not shown that the cumulative prejudicial effect of the actual errors below denied him a fair trial. *Id.*; *Dobek*, 274 Mich App at 106.

We affirm.

/s/ Joel P. Hoekstra  
/s/ Jane E. Markey  
/s/ Amy Ronayne Krause

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<sup>3</sup> "The guarantee of equal protection requires that government treat similarly situated persons alike." *People v Sadows*, 283 Mich App 65, 69; 768 NW2d 93 (2009).

<sup>4</sup> In *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993), the Court approved limited judicial participation in the plea-bargaining process involving potential sentences. "At the request of a party, and not on the judge's own initiative, a judge may state *on the record* the length of sentence that, on the basis of the information then available to the judge, appears to be appropriate for the charged offense." *Id.* at 283 (emphasis in original). This preliminary evaluation of the case would not bind the judge's sentencing discretion because additional facts could come to light at later proceedings from other sources. *Id.* If the judge later determined that the sentence must exceed its preliminary evaluation, the defendant who pleaded guilty or no contest on the basis of the judge's preliminary evaluation of an appropriate sentence would have an absolute right to withdraw the plea. *Id.*